Feb 19 1872
motion to dismiss
record

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 354.

MICHAEL HURLEY, PLAINTIFF IN ERROR,

vs.

FRANK. STREET.

IN ERROR TO THE SUPREME COURT OF THE STATE OF IOWA.

FILED OCTOBER 19, 1871.

Cowan v Cryer
Feb 19 1872
Dism'd No
Federal question

Rebutting testimony of E. A. Huber, deputy treasurer, in bill 72 22

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INDEX.

	Original.	Print.
Petition	1	1
Original notice	3	1
Officer's return of notice	4	2
Answer	4	2
Exhibit A attached to answer	9	3
Exhibit B attached to answer	13	4
Exhibit C attached to answer	15	5
Demurrer	20	6
Amendment to answer	23	7
Affidavit of defendant	24	8
Judgment	27	9
Bill of exceptions	29	9
Demurrer, in bill	29	9
Receiver's certificate, in bill	31	10
Warranty deed, Franklin Street, county judge, to Louden Mullin, in bill	32	10
Affidavit of plaintiff, in bill	36	11
Record of court, M. Hurley vs. Louden & Barbara E. Mullin, foreclosure, in bill	38	12
Judgment docket entry, in bill	41	13
Index to the same, in bill	41	13
Officer's return on execution issued, in bill	42	14
Index to officer's return	45	14
Deed of trust, Louden Mullin and wife to M. Hurley, in bill	45	15
Sheriff's deed to M. Hurley, in bill	50	16
Tax-deed, treasurer to W. H. M. Pusey, in bill	54	17
Corrected treasurer's tax-deed	59	18
Objections to the first deed, in bill	65	20
Objections to the second deed, in bill	65	20
Testimony of Tostevin, treasurer, in bill	66	20
Quitclaim-deed, W. H. M. Pusey to Frank. Street, in bill	69	21
Rebutting testimony of E. A. Huber, deputy treasurer, in bill	72	22

	Original.	Print.
Copy of certificate of purchase, in bill, at tax-sale	72	22
Register of tax-sale, in bill	78	24
Signature of judge to bill of exceptions	79	25
A paper indorsed "Notice of appeal"	80	25
Another paper indorsed "Notice of appeal"	81	25
Another paper indorsed "Agreement in regard to notice to the clerk"	83	26
Opinión	91	28
Assignment of errors	96	30
Clerk's certificate	97	30
Petition	98	30
Writ of error	102	31
Citation	104	32
Bond	105	32

1 STATE OF IOWA, *Pottawattamie County:*

Pleas before the district court of Iowa, at a term begun and holden in the county of Pottawattamie, on Wednesday the 3d day of June, A. D. 1868, before the Honorable James G. Day, judge of the 3d judicial district of the State of Iowa.

MICHAEL HURLEY
vs.
FRANK. STREET. } At law.

Be it remembered that, heretofore, to wit, on the fifteenth day of November, A. D. 1867, petition was filed in this office of the clerk of the district court, in and for the county of Pottawattamie, in the words and figures following, to wit:

District court, January term, 1868.

STATE OF IOWA, *Pottawattamie County:*

MICHAEL HURLEY
vs.
FRANK. STREET. } Action of right.

2 Your petitioner, Michael Hurley, claims of the defendant, Frank. Street, the possession of the following-described real estate, viz: Lot No. one hundred and seventy-two, (172,) in the original plat of the city of Council Bluffs, Iowa.

Your petitioner represents that he is the owner in fee of said described premises; that he is entitled to the possession of the same, and that the defendant unlawfully keeps your petitioner out of the possession thereof.

Your petitioner claims that the said defendant has been in the use and possession of said premises for a term of two years; that the use and possession is worth the sum of five hundred dollars.

Your petitioner, therefore, asks judgment for the immediate possession of said premises, and for the sum of five hundred dollars damages, with interest and costs of suit.

PRICE & JAMES, AND
C. BALDWIN,
Att'ys for Pl'ffs.

3 And afterward there was filed in the office of the said clerk a notice in the words and figures following, to wit:

STATE OF IOWA, *Pottawattamie County:*

To Honorable FRANK. STREET.

SIR: You are hereby notified that there is now on file in the office of the clerk of the district court, in and for Pottawattamie County, Iowa, the petition of Michael Hurley, claiming of you the possession of lot No. 172 in the original plat of Council Bluffs, with five hundred dollars damages, for the use and possession of the same, and that, unless you appear and answer thereto on or before noon of the second day of the January term of said court, to be begun and held in the city of Council

Bluffs, on the 27th day of January, A. D. 1868, a default will be entered against you, and a judgment rendered thereon.

4 PRICE & JAMES, AND
C. BALDWIN,
Att'ys for Pl'ffs.

Upon which was a return as follows:

The within notice was served by me upon the within-named Frank. Street, in Council Bluffs, Pottawattamie County, Iowa, by reading the same, and offering to deliver a true copy hereof to him, on the 18th day of November, 1867.

H. H. FIELD,
Sheriff said County.

And afterward, to wit, on the 28th day of January, A. D. 1868, there was filed in the office of the said clerk an answer in the words and figures following, to wit:

MICHAEL HURLEY }
vs.
FRANK. STREET. }

To the district court of Pottawattamie County, Iowa:

Comes now the defendant, and, for answer to plaintiff's petition,
5 says that each and every affirmative allegation in said petition is false and untrue, and specifically denies them as follows:

1st. He denies that plaintiff is the owner in fee of lot 172, in the original plat of the city of Council Bluffs, in Pottawattamie County, Iowa.

2nd. He denies that plaintiff is entitled to the possession of said lot.

3d. He denies that the defendant unlawfully keeps the plaintiff out of the possession of said lot.

4th. He denies that he is indebted to the said plaintiff in the sum of five hundred dollars for the use & possession of said lot, and denies that he is indebted to him in any sum for the use and possession of said lot.

5th. He admits that he is in possession of said lot, and says that he has been in possession thereof for nearly three years, and is entitled to such possession, and to the use and occupancy of said lot.

6th. He further answers and says that he is the owner in fee
6 of said lot, and entitled to the possession thereof.

That he derived his title as follows:

Said lot was subject to taxation for the years 1857, 1858, 1859, for State, county, school, and road purposes, and the taxes for said years remaining due and unpaid on the 21st day of March, 1862, the treasurer of Pottawattamie County, Iowa, (being the county wherein said lot was situated,) in pursuance of law, and by authority vested in him, sold said lot on the said 21st day of March, 1862, for the taxes of said years, to A. M. Palmer, for the sum of seventy dollars and nine cents, and executed to him a certificate of purchase, which certificate of purchase was duly assigned by the said H. M. Palmer to W. H. M. Pusey on the 10th day of September, 1864, and no one having redeemed said lot within the time limited by law, the said treasurer of Pottawatamie County on the 22nd day of March, 1865, made, executed, and delivered to the said W. H. M. Pusey, a deed of said lot, a copy of which
7 deed is hereto annexed, marked "Exhibit A."

7th. He further answers and says that, on the 10th day of April, 1865, the said W. H. M. Pusey and his wife, S. Ellen Pusey, conveyed said lot to him, (the said defendant,) a copy of which deed is hereto annexed, marked "Exhibit B."

8th. He further answers and says that the said treasurer of Pottawattamie County, Iowa, having, on the first day of September, 1866, discovered that the deed made to the said W. H. M. Pusey on the 22d day of March, 1865, contained an error in not stating that said lot was sold separately from other property, made, executed, and caused to be placed upon record another deed of said lot, a copy of which deed is hereunto annexed, marked "Exhibit C," showing the facts to be that said lot was sold separately from any other property to the said H. M. Palmer for the sum of seventy dollars and nine cents; which said last-mentioned deed conveyed to the said W. H. M. Pusey the interest
8 which the former deed, made by the treasurer as aforesaid on the 22d day of March, 1865, was intended to convey; which said last-mentioned deed inured to the benefit of the grantee of the said W. H. M. Pusey, to wit, the defendant in this action.

9th. He further answers and says that more than five years have elapsed since said lot was sold for the taxes of 1857, 1858, 1859, as aforesaid and as set forth in the deeds "A & C," hereunto annexed, and that the action for the possession of said lot is forever barred, and that the plaintiff cannot now have or maintain his action for the possession of said lot.

He therefore asks judgment against the said plaintiff for costs.

CLINTON & SAPP,
Att'ys for Def't.

9 "EXHIBIT A."

Know all men by these presents that, whereas the following described real property, viz, lot one hundred and seventy-two (172) and a part of lot one hundred and seventy-three, (173,) amounting to about 44 feet of said last-described lot, all in the original plat of Council Bluffs, situated in the county of Pottawattamie, and State of Iowa, was subject to taxation for the year' A. D. 1857, 1858, 1859; and whereas the taxes assessed upon said real property for the year' aforesaid remained due and unpaid at the date of the sale hereinafter named; and whereas the treasurer of said county did, on the 21st day of March, 1862, by virtue of the authority in him vested by law, at an adjourned sale begun and publicly held on the first Monday of December, A. D. 1860, expose to public sale,
10 at the treasurer's office in Council Bluffs, in the county aforesaid, in substantial conformity with all the requisitions of the statute in such case made and provided, the real property above described for the payment of the taxes, interest, and costs then due and remaining unpaid on said property; and whereas, at the time and place aforesaid, H. M. Palmer, of the county of Pottawattamie, and State of Iowa, having offered to pay the sum of one hundred and four dollars and 24 cents, being the whole amount of taxes, interest, and costs then due and remaining unpaid on said property for all the above-described property, which was the least quantity bid for, and payment of said sum having been by him made to the said treasurer, the said property was stricken off to him at that price; and whereas the said H. M. Palmer did, on the 10th day of September, 1864, duly assigned the certificate of the sale of said property as aforesaid and all *her* right, title, and interest to said property to W. H. M. Pusey, of the county of Pottawattamie,

11 State of Iowa; and whereas three years has elapsed since the date of said sale, and the said property has not been redeemed therefrom as provided for by law:

Now, therefore, I, Thomas Tostevin, treasurer of the county aforesaid, for and in consideration of the said sum to the treasurer paid as aforesaid, and by virtue of the statute in such cases made and provided, having granted, bargained, and sold, and by these presents do grant, bargain, and sell, unto the said W. H. M. Pusey, his heirs and assigns, the real property last hereinbefore described: To have and to hold unto him, the said W. H. M. Pusey, his heirs and assigns forever subject, however, to all the rights of redemption provided by law.

In witness whereof I, Thomas Tostevin, treasurer as aforesaid, by virtue of the authority aforesaid, have hereunto subscribed my name on this 22d day of March, A. D. 1865.

THOMAS FOSTEVIN,
Treasurer.

12 STATE OF IOWA,
Pottawattamie County:

I hereby certify that, before me, a notary public in and for said county, personally appeared the above-named Thomas Tostevin, treasurer of said county, personally known to me to be the treasurer of said county at the date of the execution of the above conveyance, and to be the identical person whose name is affixed to, and who executed, the above conveyance as treasurer of said county, and who acknowledged the execution of the same to be his voluntary act and deed as treasurer of said county for the purposes therein expressed.

Given under my hand and seal this 22nd day of March, A. D. 1865.

[SEAL.] DAVID TOSTEVIN,
Notary Public.

13 STATE OF IOWA, *Pottawattamie County:*

I, W. G. Crawford, recorder of deeds in and for said county and State aforesaid, do hereby certify that the within deed is a full, true, and correct transcript of said instrument—as full, true, and complete as the same now appears of record in my office, on page 2, vol. 1, of tax-deed record of said county.

Witness my hand officially this 24th day of January, 1868.

W. G. CRAWFORD, *Recorder.*

[5-cents revenue stamp.]

"EXHIBIT B."

Quitclaim deed—W. H. M. Pusey & wife to Frank. Street.

[Filed Aug. 30, 1865, at 11 o'clock, a. m., book X, page 556.]

14 Know all men by these presents that we, W. H. M. Pusey and wife, of the county of Pottawattamie and State of Iowa, for the consideration of three hundred dollars, hereby quitclaim to Frank Street, of the county of Pottawattamie, and State of Iowa, all our right, title, and interest in and to the following-described tract, lot, or parcel of land situated in the county of Pottawattamie, and State of Iowa, to wit, lot one hundred and seventy-two, (172,) in the original plat of Council Bluffs, Iowa.

In witness whereof we have hereunto subscribed our names this 10th day of April, 1865.

W. H. M. PUSEY.
S. ELLEN PUSEY.

[50-cents R. stamp. W. H. M. P. Apr. 10, '65.]

STATE OF IOWA, *Pottawattamie County:*

On this 10th day of April, A. D. 1865, personally appeared before me, a notary public in and for said county of Pottawattamie, and State
15 of Iowa, W. H. M. Pusey and S. Ellen Pusey, personally known to me to be the identical persons whose names are affixed to the above conveyance as grantors, and acknowledged the execution of the same to be their voluntary act and deed, for the uses and purposes therein named.

In witness whereof I have hereunto set my hand and seal this 10th day of April, A. D. 1865.

[SEAL.]

J. M. PALMER,
Notary Public.

"EXHIBIT C."

Know all men by these presents that, whereas the following-described real property, viz, lot one hundred and seventy-two (172) and a part of lot one hundred and seventy-three, (173,) amounting to about 44 feet of said last-described lot, in the original plat of the town of Council Bluffs, in Pottawattamie County, in the State of Iowa, was subject to taxation for the years A. D. 1857, 1858, 1859; and whereas the taxes
16 assessed upon said real property for the year aforesaid remained due and unpaid at the date of the sale hereinafter named; and whereas the treasurer of said county did, on the 21st day of March, 1862, by virtue of the authority in him vested by law, at an adjournment of the sale begun and publicly held on the first Monday of December, A. D. 1860, expose to public sale, at the treasurer's office, in Council Bluffs, in the county aforesaid, in substantial conformity with all the requisitions of the statute in such case made and provided, the real property above described, for the payment of the taxes, interest, and costs, then due and remaining unpaid on said property; and whereas, at the time and place aforesaid, H. M. Palmer, of the county of Pottawattamie, and State of Iowa, having offered to pay the sum of seventy dollars and nine cents on said lot 172, and thirty-four dollars and fifteen cents on the said part of lot 173, being the whole amount of taxes,
17 interest, and costs, then due and remaining unpaid on said property, for all the above-described property, each of said tracts having been offered for sale separately, which was the least quantity bid for; and payment of said sum having been by him made to the said treasurer, the said property was stricken off to him at that price; and whereas the said H. M. Palmer, did, on the 10th day of September, 1864, duly assign the certificate of sale of said property as aforesaid, and all his right, title, and interest to said property, to W. H. M. Pusey, of Pottawattamie County, State of Iowa; and whereas three years has elapsed since the date of said sale, and the said property has not been redeemed therefrom as provided for by law, nor either of said tracts, or any part thereof:

Now, therefore, I, Thomas Tostevin, treasurer of the county aforesaid, for and in consideration of the said sum, to the treasurer paid as aforesaid, and by virtue of the statute in such cases made and pro-

vided, having granted, bargained, and sold, and by these presents
18 do grant, bargain, and sell unto the said W. H. M. Pusey, his heirs and assigns, the real property last hereinbefore described: To have and to hold unto him, the said W. H. M. Pusey, his heirs and assigns forever; subject, however, to all the rights of redemption provided by law.

In witness whereof I, Thomas Tostevin, treasurer as aforesaid, by virtue of the authority aforesaid, have hereunto subscribed my name on this first day of September, A. D. 1866.

The above deed being made for the purpose of correcting an error in a tax-deed made to the same property on the 22nd day of March, A. D. 1865.

THOMAS TOSTEVIN,
Treasurer.

STATE OF IOWA, *Pottawattamie County:*

I hereby certify that, before me, a notary public in and for said
19 county, personally appeared the above-named Thomas Tostevin, treasurer of said county, personally known to me to be treasurer of said county at the date of the execution of the above conveyance, and to be the identical person whose name is affixed to, and who executed the above conveyance as treasurer of said county, and who acknowledged the execution of the same to be his voluntary act and deed as treasurer of said county, for the purposes therein expressed.

Given under my hand and seal this 1st day of September, A. D. 1866.

[SEAL.] DAVID TOSTEVIN,
Notary Public.

STATE OF IOWA, *Pottawattamie County:*

I, W. G. Crawford, recorder of deeds in and for said county and State aforesaid, do hereby certify that the within deed is a full, true,
20 and correct transcript of said instrument—as full, true, and complete as the same now appears of record in my office on page 144, of vol. 1 of tax-deed record of said county.

Witness my hand officially this 24th January, 1868.

W. G. CRAWFORD,
Recorder.

[5-cents R. stamp.]

MICHAEL HURLEY }
vs. .
FRANK. STREET. }

And afterward, to wit, on the 29th day of January, A. D. 1868, it being the third day of the January term of the said court, said Michael Hurley, plaintiff, filed demur'er to the answer of the said Frank Street, defendant, to wit:

District court, Jan'y term, 1868.

STATE OF IOWA, *Pottawattamie County:*

MICHAEL HURLEY }
21 *vs.* } Action of right.
FRANK. STREET. }

Now comes plaintiff and demures to the 6th, 7th, 8th, and 9th paragraphs in def't's answer, and assigns the following as causes of demur'er:

1. The deed referred to in the 6th paragraph, and annexed to defendant's answer, and marked "Exhibit A," is void upon its face, and confers no such title as would give the grantee, or them holding under him, any right to the possession of said premises.

2. The deed from the county treasurer to Pusey being void, the deed from Pusey and wife to defendant passed no such title as would give defendant the right to the possession of said premises.

3. The treasurer had no right or power to make the corrected deed referred to in the 8th paragraph of defendant's answer. The corrected deed passed no right to defendant.

4. The facts stated in defendant's answer do not show that plaintiff is barred from recovering the possession of said premises by the statute of limitations, as stated in the 9th paragraph of said answer.

22 5. The law authorizing the sale of real property for delinquent taxes, and under which the deed was made by which defendant claims title, is unconstitutional and void.

6. The sale was not made at the time fixed by law, and is, therefore, void.

PRICE & JAMES, &
C. BALDWIN,
Att'ys for Pl'nt'ff.

MICHAEL HURLEY
vs.
FRANK. STREET.

And now, on this 8th day of June, A. D. 1868, it being the 5th day of the said June term thereof, this cause coming on for hearing on plaintiff's demur'er to the defendant's answer, now comes up for hearing plaintiff' demur'er to defendant's answer, and the same being duly considered by the court is overruled; to which the plaintiff excepts.

23 And afterward, to wit, on the 30th day of June, 1868, it being the 22d day of the June term of said court, defendant filed the following amendment to his answer heretofore filed in this cause, to wit:

MICHAEL HURLEY
vs.
FRANK. STREET.

To the district court of Pottawattamie County, Iowa:

Comes now the defendant and files an amendment to his former answer in this cause filed, and, in addition to the matters and things set forth in said former answer, adds the following:

1. That he took possession of the property, described in plaintiff's petition, under and by virtue of the authority given and granted to him by W. H. M. Pusey and S. Ellen Pusey, in the deed annexed to his former answer, marked "Exhibit B."

24 That he took possession of said property with the knowledge and the consent of the said W. H. M. Pusey and S. Ellen Pusey, and still holds possession with their knowledge and consent, and by their authority.

3. That the said W. H. M. Pusey and S. Ellen Pusey have no claim to the possession of said lot or of the title thereto, adverse to the claim and title and right of possession of this defendant.

CLINTON AND SAPP,
Att'ys for D'f't.

And afterward, to wit, on the first day of July, A. D. 1868, it being the 23d day of the June term of the said court, defendant filed an affidavit in this cause in the words and figures following, to wit:

MICHAEL HURLEY
vs.
FRANK. STREET.

To the district court of Pottawattamie County, Iowa:

I, Frank. Street, defendant in the above-entitled cause, do solemnly swear that the original deeds, copies of which are an'exed to the
25 answer in this cause, marked "Exhibit A" and "Exhibit C," do not belong to me and are not within my control; that they are the property of W. H. M. Pusey, my grantor of the property in controversy; that before I drew the answer in this cause I called upon Mr. Pusey to get said deeds, and that he then and there made search among his papers for said deeds, and stated to me, after making such search, that he could not find them, and I verily believe they have been lost. I therefore make this affidavit for the purpose of obtaining permission of the court to use in evidence on the trial of said cause properly-authenticated copies of the records of said deeds.

FRANK. STREET.

Subscribed and sworn to before me, by Frank Street, this first day of July, 1868.

E. F. BURDICK,
Clerk District Court.

26 And afterward, to wit, on the first day of July, A. D. 1868, it being the 23d day of the June term of the said court, defendant filed a motion to use copies of deeds in this cause in the words and figures following, to wit:

MICHAEL HURLEY
vs.
FRANK. STREET.

To the district court of Pottawattamie County:

I, Frank. Street, defendant in the above-entitled cause, do solemnly swear that the original deeds, copies of which are an'exed to the answer in this cause, marked "Exhibit A" and "Exhibit C," do not belong to me, and are not under my control, and I therefore ask permission of the court to use in evidence on the trial of said cause authenticated copies from the record of said deeds.

FRANK. STREET.

27 Subscribed and sworn to before me, by Frank Street, this 30th day of June, 1868.

E. F. BURDICK,
Clerk Dist. Court.

And afterward, to wit, on the 3d day of July, A. D. 1868, it being the 25th day of the June term of the said court, this cause coming on for final hearing, is submitted to the court for trial, and after hearing the evidence and the arguments of council, the following proceedings were had and entered of record, to wit:

MICHAEL HURLEY
vs.
FRANK. STREET. } Action of right.

Now come the said parties, by their attorneys, and the defendant files affidavit showing inability to introduce original deeds in evidence.

This cause now coming on for trial is submitted to the court, and after hearing the evidence and the argument of counsel, the court
28 finds that defendant is entitled to the possession of the property in controversy.

And it is further ordered that defendant have and recover from said plaintiff the costs herein accrued, taxed at $, and that execution or fee-bill issue therefor.

To all of which plaintiff excepts, and has 60 days to settle bills of exception.

Signed at the end of the day's proceedings.

JAMES G. DAY, *Judge.*

MICHAEL HURLEY
vs.
FRANK. STREET. } At law.

Be it remembered that, heretofore, to wit, on the 2d day of December, A. D. 1868, the plaintiff filed his bills of exceptions in the office of the clerk of the district court in and for the county of Pottawattamie, in the words and figures following, to wit:

29 *Bill of exceptions.*

District court, Pottawattamie County, Iowa, June term, 1868.

MICHAEL HURLEY
vs.
FRANK. STREET.

Be it remembered that the plaintiff in this cause filed a demur'er to defendant's answer, in words and figures, as follows:

District court, Jan'y term, 1868.

STATE OF IOWA, *Pottawattamie County:*

MICHAEL HURLEY
vs.
FRANK. STREET. } Action of right.

Now comes plaintiff and demures to the 6th, 7th, 8th, and 9th paragraphs in defendant's answer, and assigns the following as causes of demur'er:

1. The deed referred to in the 6th paragraph, and an'exed to defendant's answer, and marked "Exhibit A," is void upon its face, and confers no such title as would give to the grantee, or those holding
30 under him, any right to the possession of said premises.

2. The deed from the county treasurer to Pusey being void, the deed from Pusey and wife to defendant passed no such title as would give defendant the right to the possession of said premises.

3. The treasurer had no right or power to make the cor'ected deed

referred to in the 8th paragraph of defendant's answer. The corrected deed passed no title to defendant.

4. The facts stated in defendant's answer do not show that plaintiff is barred from recovering the possession of said premises by the statute of limitation, as stated in the 9th paragraph of said answer.

5. The law authorizing the sale of real property for delinquent taxes, and under which the deed was made by which defendant claims title, is unconstitutional and void.

6. The sale was not made at the time fixed by law, and is therefore void.

PRICE & JAMES, &
C. BALDWIN,
Att'ys for Pl'ff.

31 Which was overruled by the court; to which ruling the plaintiff at the time excepted.

Be it further remembered that, on the trial of said cause, a jury having been waived, and the same submitted to the court, the following evidence was introduced by plaintiff:

1. Certificate of receiver of public lands, of Council Bluffs, Iowa, in words and figures as following, to wit:

RECEIVER'S OFFICE, COUNCIL BLUFFS, IOWA,
July 9th, 1868.

I certify that it appears from the records in this office that the following-described lands, to wit, W. ½ of S.W. ¼ sec. 30, 75, 43; W. ½ of N.W. ¼, sec. 31, 75, 43; southeast ¼, sec. 25, 75, 44; east ½ of S.W. ¼, sec. 25, 75, 44; northeast ¼, sec. 36, 75, 44; E. ½ of N.W. ¼, sec.
32 36, 75, 44, was entered by Franklin Street, county judge of the county of Pottawattamie, on the 10th day of May, 1854.

D. C. BLOOMER,
Receiver.

2d. Frank. Street, witness, who testified that the lot in controversy was situated on one of the lots described in the receiver's certificate.

3d. A certificate copy of deed from Frank Street to Loudon Mullin, in words and figures as follows:

Warranty deed—Franklin Street, county judge of Pottawattamie County, Iowa, to Loudon Mullin.

[Filed July 27th, 1854, at 2 o'clock p. m. Recorded book "A," page 450.]

This indenture witnesseth that I, Franklin Street, county judge of Pottawattamie County, in the State of Iowa, in accordance
33 with the provisions o fan act of Congress entitled An act for the benefit of citizens and occupants of the town of Council Bluffs, in Iowa, and in consideration of five $\frac{30}{100}$ dollars to me paid, have this day sold and conveyed to London Mullin the following-described tract of land, to wit: Lot No. one hundred and seventy-two, (172,) fronting on Broadway fifty feet, and on Pierce street fifty-one feet, and lot No. two hundred and twenty-six, (226,) containing one-half acre, more or less, in said town of Council Bluffs, with all the appurtenances thereunto belonging, and agree in behalf of said county to warrant and de-

fend the title thereto against the claims of all persons holding by virtue of any right derived from the United States.

In witness whereof I have hereunto set my hand and affixed the
34 seal of the county court this twenty-second day of June, 1854.

[SEAL.] FRANKLIN STREET,
Judge of Pottawattamie County, Iowa.

THE STATE OF IOWA, *Pottawattamie County:*

Personally appeared before me, Jefferson P. Casady, undersigned, a notary public in and for said county, Franklin Street, county judge of Pottawattamie, in the State of Iowa, and acknowledged the foregoing deed to be his voluntary and official act, for the purposes therein expressed, and he is personally known to me to be the identical person whose name appears as grantor to the same.

In witness whereof I have hereunto set my hand and affixed my notarial seal this 22d day of June, 1854.

[SEAL.] JEFFERSON P. CASADY,
Notary Public, Pottawattamie County, Iowa.

35 STATE OF IOWA, *Pottawattamie County:*

I, W. G. Crawford, county recorder in and for said county, do hereby certify that I have carefully compared the annexed copy of a warranty deed from Franklin Street, as county judge, to Loudon Mullin, with the original record in this office, and that the same is a correct transcript therefrom, and the whole of such original record, as the same will fully appear of record in book "A," page 450, of the records of the county aforesaid.

Witness my hand officially this 29th day of June, 1868.

W. G. CRAWFORD,
Recorder.

Also, the affidavit of Michael Hurley, showing the absence of the original, in words and figures as follows:

36 DISTRICT OF COLUMBIA,
City of Washington:

Michael Hurley, being first duly sworn, on his oath deposes and says: That he is the plaintiff in the suit now pending in the district court of Pottawattamie County, Iowa, wherein affiant is plaintiff and Frank. Street the defendant, in which action plaintiff seeks to recover the possession of lot No. one hundred and seventy-two, (172,) in the original plat of the city of Council Bluffs, Iowa. Affiant states that, on the 22d day of June, 1854, Frank. Street, as county judge of the said county of Pottawattamie, executed, acknowledged, and delivered to Loudon Mullin a deed for said lot; that said deed, on the 27th day of July, 1854, was filed for record in the office of the recorder of deeds of the said county of Pottawattamie, and recorded in book "A," page 450.

37 Affiant states that the original deed then recorded is material evidence for the plaintiff in the trial of said cause.

Affiant states that said original deed never was in his possession, or under his control, and he does not own or control the same, nor does affiant know where the same can be found.

MICHAEL HURLEY.

Subscribed to by Michael Hurley in my presence, and sworn to by him before me this 23d day of May, 1868.

[NOTARIAL SEAL.] JOHN P. HOLLINGSHEAD,
Notary Public.

4. Judgment docket of the district court of Pottawattamie County, Iowa, showing a judgment in favor of Michael Hurley and against Loudon Mullin and Barbara E. Mullin. Also, the court record of said
38 district court, showing a record entry of said judgment, and the execution docket of said district court, copies of which are in words and figures as follows, to wit:

On the 14th day of February, A. D. 1862, it being the 11th day of the February term of the said court, this cause coming on for final hearing, is submitted to the court for trial; and, after hearing the evidence, and having considered the same, the following proceedings were had, and entered of record, to wit:

MICHAEL HURLEY
vs.
LOUDON MULLIN AND BARBARA E. MULLIN. } Foreclosure.

Comes now the said plaintiff, by his attorney, and, it appearing that the said defendants were notified of the pendancy of this action according to law, and that they have failed to appear or make any de-
39 fense herein, it is considered by the court that they are in default for want of an answer, and the same is accordingly entered against them; and the allegations and proof being examined and considered:

It is ordered and adjudged by the court that the said plaintiff have and recover of and from the said defendant Loudon Mullin the sum of twenty-eight hundred and eighty-one dollars, and also the costs of this suit, taxed at $.

And it is further ordered, adjudged, and decreed by the court that a special execution issue herein against the following-described premises, to wit: Lot number one hundred and seventy-two, (172,) and forty-four feet off the east side of lot one hundred and seventy-three, (173,) fronting on Broadway, and running back to Pierce street, and lot No. 24, fronting on Greene and Benton streets, except that portion sold to W. Robinson, all in the original plat of the city of Council Bluffs; also, lot four, (4,) in block eighteen, in Grimes' addition to said city of Council
40 Bluffs, and that the same be sold to satisfy the above-named amount, with interest and costs, and that all the right, title, interest, and equity of redemption of the said defendants Loudon and Barbara E. Mullin, and of all persons claiming under them in and to said premises, be, and is hereby, forever barred and foreclosed.

And if the above-described property should not sell for a sufficient sum to satisfy this judgment, then a general execution may issue against the property of said defendant, Loudon Mullin, for the remainder due.

Signed at the end of the day's proceedings.

E. H. SEARS, *Judge.*

Plaintiff.	Num.	Defendants.	Date of judgment.	Debt.	Damage.	Issue of execution.	Return of execution.	Receipts.
M. Hurley..	153	Loudon Mullin and Barbara E. Mullin.	Feb'y 14th, 1862.	$2,881 00	4 25	Aug. 10th, 1863.	Sept. 21st, 1863.	Execution returned partly satisfied by sale of mortgage property, and the sum of $1,220 05 made, and credited on this judgment.
						Nov. 13, 1867.	Dec. 16, 1867.	Second execution returned, the sum of $915 00 credited on judgment, by sale of real estate.
						For	a valuable	consideration I hereby assign the within judgment to H. M. Palmer. M. HURLEY, By W. C. JAMES, *Att'y-in-fact.*
						Dec.	22d, 1868.	
M. Hurley	vs.	Loudon and Barbara E. Mullin.	Docket page	111	Direct index.			
Loudon and Barbara E. Mullin	ads.	M. Hurley.	Docket page	111	Inverse index.			

42 Upon the execution issued in this cause, on the 10th day of August, A. D. 1863, and returned September 21st, A. D. 1863, and endorsed thereon is the officer's return in full in words and figures, to wit:

M. HURLEY
vs.
LOUDON MULLIN AND BARBARA E. MULLIN.

This writ came to hand on the 10th day of August, A. D. 1863, at 10 o'clock a. m., and, on the same day, I levied upon the following real estate of the within-named defendants, Loudon Mullen, and Barbara E. Mullen, to wit: Lot No. one hundred and seventy-two (172) and forty-four (44) feet of the east side of lot one hundred and seventy-three, (173,) fronting on Broadway, and running back to Pierce street; and lot No. forty-four, (44,) fronting on Greene and Benton streets, except that portion sold to W'm Robison, all situated in the original plat of
43 Council Bluffs, Pottawattamie County, Iowa; also lot four, (4,) in block eighteen, in Grimes' addition to the city of Council Bluffs, Pottawattamie County, Iowa.

In pursuance of the command of the within writ, I advertized to sell, on Monday the 21st day of September, A. D. 1863, at 3 o'clock p. m., the real estate fully described in the body of this writ by giving four consecutive weeks' notice of the time and place of such sale by publication in the Council Bluffs Weekly Nonpareil, and by posting up three notices in three public places in the county, as the law directs; one of which was at the door where the last district court of Pottawattamie County, Iowa, was held, to wit: On the day, and at the hour aforesaid, I did offer the within-described real estate for sale at public outcry at the front door of the treasurer's and recorder's office, to the highest and best bidder, for cash, and sold the same to M. Hurley, he having been the highest and best bidder, having bid on each tract or parcel of land
as follows: On lot No. 172, $600 00; on fourty-four (44) feet off
44 the east side of lot 173, fronting on Broadway, and running back to Pierce street, five hundred dollars; on lot No. 24, fronting on Greene and Benton streets, except sixty-six (66) feet, sold to W'm A. Robison, off the north side, running parallel with Greene street, and fronting sixty-six (66) feet on Benton street, one hundred dollars—all situated in the original plat of the city of Council Bluffs, Pottawattamie County, Iowa; and on lot four, (4,) in block No. eighteen, (18,) in Grimes' addition to the city of Council Bluffs, Iowa, the sum of fifty (50) dollars, making, in the aggregate, the sum of twelve hundred and fifty dollars (1,250 00.) Out of this amount, I paid, as clerk's fees, $5 50; printer's fees, $6 00; revenue stamp, $2 00, and sheriff's fees, $16 45, making the costs $29 95, and the balance to wit, $1,220 05, to apply on the judgment, and returned the execution not satisfied in full; and, on the same day, Sept. 21st, A. D. 1863, I executed deed to the said M. Hurley for the above-described tracts or parcels of land as the law directs.

CORNELIUS VOORHIS,
Sheriff of Pottawattamie County, Iowa.

45 *Index.*

Plaintiff.		Defendant.		
M. Hurley.....	vs.	Loudon and Barbara E. Mullin	Sale-book 1, page.....	265

To the introduction of all of which the defendant objected; which objection was, by the court, overruled, and the defendant excepted.

E. F. Burdick, witness, who testified that he was clerk of the said district court, and that the original papers in the cause of Hurley vs. Mullen, were consumed by fire on the morning of the 31st of December, A. D. 1867.

5. Copy of deed of trust from Loudon Mullen and wife to Michael Hurley, in words and figures as follows, to wit:

Deed of trust—Loudon Mullen & wife to Michael Hurley.

[Filed May 18th, 1858, at 2 o'clock p. m. Recorded in book H, page 283.]

46 For the consideration of twenty-four hundred and seventy-one $\frac{57}{100}$ dollars in hand paid, we, Loudon Mullin and Barbara E Mullen, his wife, of the county of Mills, and State of Iowa, hereby convey to John T. Baldwin, as trustee, the following-described premises, situated in the city of Council Bluffs, county of Pottawattamie, and State of Iowa, to wit: Lot No. one hundred and seventy-two, (172,) and forty-four feet off the east side of lot No. one hundred and seventy-three, (173,) fronting on Broadway and running back to Pierce street; and lot No. twenty-four, (24,) fronting on Greene and Benton streets, except that portion sold to William Robinson, all in the original plat of said city of Council Bluffs, as surveyed by Tho's Tostevin; and also lot four, (4,) block eighteen, (18,) Grimes' addition to Council Bluffs, and we do hereby covenant to warrant and defend the title to the said prem-
47 ises, against the lawful claims of all persons whomsoever; and the said Barbara E. Mullin hereby relinquishes her right of dower in and to the premises herein conveyed for the purpose of securing to M. Hurley the payment of the following-described note of even date herewith, and payable on or before March 1st, 1859, given to said Hurley by Loudon Mullin, for $2,471 57 *dollars*, and if the sum so secured to said M. Hurley is not paid by the time the same becomes due, we hereby authorize the said John T. Baldwin to sell the premises hereby conveyed, after giving thirty days' notice of the time and place of sale, by publication in some newspaper published in Council Bluffs aforesaid, and by posting up printed notice in at least three public places in said city of Council Bluffs, and to execute a deed to the purchaser to pay off the amount herein secured, with interest and costs, and to hold
48 the remainder, if any, subject to our order.

Witness our hands this 15th day of May, 1858.

LOUDEN MULLIN.
BARBARA E. MULLIN.

STATE OF IOWA, *Mills County:*

On this 15th day of May, 1858, before me a notary public in and for said county, personally came Louden Mullin and Barbara E. Mullin, his wife, to me personally known to be the identical persons whose names are affixed to the above deed of trust as grantors, and acknowledged the same to be their voluntary act and deed, and the same Barbara E. Mullen hereby acknowledges her relinquishment of her right of dower in and to the above-described premises.

In testimony whereof I have hereunto set my hand and seal notarial this 15th day of May, 1858.

[SEAL.]

S. A. MOER,
Notary Public.

49 STATE OF IOWA, *Pottawattamie County:*

I, W. G. Crawford, county recorder, in and for said county, do hereby certify that I have carefully compared the annexed copy of a deed of trust from Louden Mullen and wife to M. Hurley with the original record in this office, and that the same is a correct transcript therefrom, and the whole of such original record, as the same will fully appear of record in book H, at page 283, of the records of the county aforesaid.

Witness my hand officially this 29th day of June, A. D. 1868.

W. G. CRAWFORD,
Recorder.

Defendant objects to the introduction of the same as immaterial.

Objection overruled, and the defendant excepts.

6th. Sheriff's deed to Michael Hurley, in words and figures as follows:

50 *Sheriff's deed—C. Voorhis, sheriff—to M. Hurley.*

[Filed for record Sept. 28th, 1863, at 9 o'clock a. m., and recorded in book "W," page 197.]

Whereas on the 21st day of Sept., A. D. 1863, the sheriff of Pattawattamie County, in the State of Iowa, in obedience to the mandates of a special execution to him directed by the clerk of the district court of Pottawattamie County, in the State of Iowa, upon a judgment obtained in said county last named, on the foreclosure of a mortgage in favor of M. Hurley, and against Louden Mullin and Barbara E. Mullen, did offer the following tracts or parcels of land for sale to the highest bidder, for cash, to wit:

Lot number one hundred and seventy-two, (172,) and forty-four (44) feet *of* off the east side of lot number one hundred and seventy-
51 three, (173,) fronting on Broadway, and running back to Pierce street; and all of lot number twenty-four, (24,) excepting that part sold to William A. Robinson, being a part of said lot number twenty-four, (24,) being sixty-six feet of the north end of said lot running parallel with Green street, and fronting sixty-six (66) feet on Benton street, all situated in the original plat of the city of Council Bluffs, Iowa; also, lot four, (4,) in block eighteen, (18,) in Grimes' addition to the city of Council Bluffs, Pottawattamie County, Iowa.

Notice of the time and place of sale having previously been given, as required by law, and whereas at such sale M. Hurley was the highest and best bidder, he having bid on each tract or parcel of land as follows:

On said lot number one hundred and seventy-two, (172,) six hundred dollars; on said forty-four (44) feet of off the east side of said lot
52 number one hundred and seventy-three, (173,) and running back to Pierce street, five hundred dollars; and on lot number twenty-four, (24,) excepting that portion sold to W. A. Robinson, being a part of said lot number twenty-four, (24,) being sixty-six (66) feet of the north end of said lot, running parallel with Green street and fronting on Benton street sixty-six (66) feet, the sum of fifty dollars; all situated in the original plat of the city of Council Bluffs, Iowa; on lot number four, (4,) in block eighteen, (18,) in Grimes' addition to the city of Council Bluffs, Pottawattamie County, Iowa, the sum of fifty dollars—making in the aggregate, the sum of twelve hundred and fifty ($1,250 00) dollars:

Therefore I, Cornelius Voorhis, sheriff of said county of Pottawattamie, in obedience to the requirements of law, and in consideration of the sum of one dollar to me paid, hereby convey to M. Hurley the real estate above described.

53 In witness whereof I have hereunto set my hand this 21st day of September. A. D. 1863.

CORNELIUS VOORHIS, *Sheriff.*

[$2 00 revenue stamp.]

STATE OF IOWA, *Pottawattamie County:*

On this day personally appeared before me, clerk of the district court in and for said county, Cornelius Voorhis, sheriff of said county, who is personally known to me to be the identical person whose name appears as grantor of the foregoing deed, and who was, at the time of making said deed, sheriff as aforesaid, and acknowledged the execution thereof to be his voluntary act and deed.

In witness whereof I have hereunto set my hand and official seal this 21st day of September, A. D. 1863.

[SEAL.] E. F. BURDICK.

54 Defendant objects that the deed is defective in not reciting sufficiently any judgment or decree on which the execution was issued; in not sufficiently reciting when the execution was issued, and when the property was sold, nor for what amount; objection overruled; defendant excepts.

Defendant then introduced upon his part two copies of tax-deeds, in words and figures, to wit:

Know all men by these presents that whereas the following-described property, viz: Lot number one hundred and seventy-two (172) and a part of lot one hundred and seventy-three, (173,) amounting to about forty-four feet of said last-described lot, all in the original plat of Council Bluffs, situated in the county of Pottawattamie and State of

55 Iowa, was subject to taxation for the years A. D. 1857, 1858, 1859; and whereas the taxes assessed upon said real property for the years aforesaid remained due and unpaid at the date of the sale hereinafter named; and whereas the treasurer of said county did, on the 21st day of March, 1862, by virtue of the authority in him vested by law, at an adjourned sale begun and publicly held on the first Monday of December, 1860, expose to public sale, at the treasurer's office in Council Bluffs, in the county aforesaid, in substantial conformity with all the requisitions of the statute in such case made and provided, the real property above described for the payment of the taxes, interests, and costs then due and remaining unpaid on said property; and whereas, at the time and place aforesaid, H. M. Palmer, of the county of Pottawattamie and State of Iowa, having offered to pay the sum of one

56 hundred and four dollars and 24 cents, being the whole amount of taxes, interests, and costs then due and remaining unpaid on said property for all of the above-described property, which was the least quantity bid for, and payment of said sum having been by him made to the said treasurer, the said property was stricken off to him at that price; and whereas the said H. M. Palmer did, on the 10th day of September, 1864, duly assign the certificate of the sale of said property as aforesaid and all *her* right, title, and interest to said property to W. H. M. Pusey, of the county of Pottawattamie and State of Iowa, and whereas three years have elapsed since the date of said sale, and

the said property has not been redeemed therefrom as provided for by law:

Now, therefore, I, Thomas Tostevin, treasurer of the county aforesaid, for and in consideration of the said sum to the treasurer paid as
57 aforesaid, and by virtue of the statute in such cases made and provided, having granted, bargained, and sold, and by these presents do grant, bargain, and sell, unto the said W. H. M. Pusey, his heirs and assigns, the real property last hereinbefore described: To have and to hold unto him, the said W. H. M. Pusey, his heirs and assigns forever; subject, however, to all the rights of redemption provided by law.

In witness whereof I, Tho's Tostevin, treasurer as aforesaid, by virtue of the authority aforesaid, have hereunto subscribed my name on this 22d day of March, A. D. 1865.

THO'S TOSTEVIN,
Treasurer.

STATE OF IOWA, *Pottawattamie County:*

I hereby certify that before me, a notary public in and for said
58 county, personally appeared the above-named Tho's Tostevin, treasurer of said county, personally known to me to be the treasurer of said county at the date of the execution of the above conveyance, and to be the identical person whose name is affixed to and who executed the above conveyance, as treasurer of said county, and who acknowledged the execution of the same to be his voluntary act and deed, as treasurer of said county, for the purpose therein expressed.

Given under my hand and seal this 22d day of March, A. D. 1865.

[SEAL.] W. G. CRAWFORD,
Notary Public.

STATE OF IOWA, *Pottawattamie County:*

I, W. G. Crawford, recorder in and for the county and State aforesaid, do hereby certify that the within is a full, true, and complete
59 transcript of a treasurer's tax-deed, made by Pottawattamie County, State of Iowa, by its treasurer, Tho's Tostevin, to W. H. M. Pusey, dated March 22d, 1865, and filed for record in my office on said 22d day of March, 1865, at 9 o'clock a. m., and duly recorded at page 2, vol. 1 of lots tax-deed record, as the same remains of record in my office.

Witness my hand this 21st day of August, 1867.

W. G. CRAWFORD,
Recorder.

Know all men by these presents that, whereas the following-described real property, viz:

One hundred and seventy-two, (172,) and a part of lot one hundred and seventy-three, (173,) amounting to about 44 feet of said last-described lot, all in the original plat of the town of Council Bluffs,
60 in Pottawattamie County, in the State of Iowa, was subject to taxation for the years A. D. 1857, 1858, 1859; and whereas the taxes assessed upon said real property, for the years aforesaid, remained due and unpaid at the date of the sale hereinafter named; and whereas the treasurer of said county did, on the 21st day of March, 1862, by virtue of the authority in him vested by law, at an adjournment of the sale begun and publicly held on the first Monday of December, A. D. 1860, expose for public sale at the treasurer's office in Council Bluffs, in the

county aforesaid, in substantial conformity with all the requisitions of the statute in such case made and provided, the real property above described for the payment of the taxes, interests, and costs, then due and remaining unpaid on said property; and whereas at the time and place aforesaid, H. M. Palmer, of the county of Pottawattamie,
61 and State of Iowa, having offered to pay the sum of seventy dollars and nine cents on said lot 172, and thirty-four dollars and fifteen cents on the said part of lot 173, being the whole amount of taxes, interests, and costs, then due and remaining unpaid on said property, for all the above-described property, each of said tracts having been offered for sale separately, which was the least quantity bid for; and payment of said sum having been by him made to the said treasurer, the said property was stricken off to him at that price; and whereas the said H. M. Palmer did, on the 10th day of September, 1864, duly assign the certificate of the sale of said property as aforesaid, and all *her* right, title, and interest to said property, to W. H. M. Pusey, of the county of Pottawattamie, and State of Iowa; and whereas three years *has* elapsed since the date of said sale, and the said property has not been redeemed therefrom as provided for by law, nor either
62 of said tracts, or any part thereof:

Now, therefore, I, Thomas Tostevin, treasurer of the county aforesaid, for and in consideration of the said sum to the treasurer paid as aforesaid, and by virtue of the statute in such cases made and provided, *having* granted, bargained, and sold, and by these presents, do grant, bargain, and sell, unto the said W. H. M. Pusey, his heirs and assigns, the real property last hereinbefore described: To have and to hold unto him, the said W. H. M. Pusey, his heirs and assigns forever; subject, however, to all the rights of redemption provided by law.

In witness whereof I, Thomas Tostevin, treasurer as aforesaid, by virtue of the authority aforesaid, have hereunto subscribed my name on this 1st day of September, A. D. 1866, the above deed being made for the purpose of correcting an error in a tax-deed made to the same property on the 22d day of March, 1865.

THO'S TOSTEVIN,
Treasurer.

63 STATE OF IOWA, *Pottawattamie County:*

I hereby certify that before me, a notary public in and for said county, personally appeared the above-named Tho's Tostevin, treasurer of said county, personally known to me to be the treasurer of said county at the date of the execution of the above conveyance, and to be the identical person whose name is affixed to and who executed the above conveyance, as treasurer of said county, and who acknowledged the execution of the same to be his voluntary act and deed, as treasurer of said county, for the purposes therein expressed.

Given under my hand and seal this 1st day of September, A. D. 1866.

[SEAL.] DAVID TOSTEVIN,
Notary Public.

64 STATE OF IOWA, *Pottawattamie County:*

I, W. G. Crawford, recorder in and for the county and State aforesaid, do hereby certify that the within is a full, true, and complete transcript of a treasurer's tax-deed made by Pottawattamie County, State of Iowa, by the treasurer, Tho's Tostevin, to W. H. M. Pusey, dated Sept. 1st,

1866, and filed for record in my office on said 1st day of Sept., 1866, at 5 o'clock p. m., and duly recorded at page 144, vol. 1, of lots tax-deeds record, as the same remains of record in my office.

Witness my hand this 21st day of August, 1867.

W. G. CRAWFORD,
Recorder.

To the introduction of which the plaintiff objects:

To the first deed—

65 1st. That it shows sale of two tracts by the office at the same time.

2d. Sale made at a time not provided for by law.

3d. No legal assessment of taxes for the year 1858.

4th The treasurer had no power to sell for taxes for the years for which sale was made.

5th. No advertisement of the sale.

6th. The deed is void because sold in a lump.

To the second deed—

1st. Treasurer had no power to make corrected deed.

2d. Corrected deed passes no title to the defendants.

3d. The corrected deed is not in accordance with the facts.

4th. The corrected deed was made without any certificate of sale showing the facts recited.

5th. The second deed shows that the sale was made at a time not authorized by law.

66 In support of defendant's right to introduce said deeds THO'S TOSTEVIN, witness, was introduced who testifies as follows:

I was treasurer at the time the deed was made. The second deed was made by me. In fall of 1861 I was treasurer of Pottawattamie County. There was no sale for the taxes of the year 1861, in October, 1861. There was adjournments from the time of the sale in December, 1860, until the sale in March, 1862; none of the adjournments exceeding two months. There was no advertisement for sale to be made in October, 1861. If there was any sale at that time it was in consequence of previous adjournments. There was no regular annual sale in the year 1861 for two reasons:

1st. The books from which the treasurer collect' his taxes were not placed in the hands of the treasurer at the time required.

2d. The chief reason was on account of the immense amount of accumulated back tax, that had to be collected. The delay in the
67 delivery of the books was not great. There were successive notices, not exceeding two months, from the time of the sale in December, 1860, until March, 1862. I do not remember that there was any regularly-advertised sale from the fall of 1860, until the fall of 1862. There was no advertized sale in the fall of 1861, for the taxes of previous years. There was no advertisement for the taxes of 1860, and the taxes due for previous years had been advertised by my predecessor. Mr. Turner advertised the property for sale on the first Monday in December, 1860, and the sale was adjourned from time to time at periods not exceeding two months until after the sale of this property was made and until the next regular sale. There is no record kept of the adjournments of the sale. I know from the papers that notice for sale was advertised to take place in December, 1860. I merely know about these adjourn-

ments only that I know I was very careful not to exceed two months.
Notice of this adjournment was given by posting up written no-
68 tice in the treasurer's office. I saw Mr. Turner's notice of ad-
journment in his office. There was no regularity in the adjournment.

There was an advertisement for sale of lands in 1861, which was defective and no sale was had. It seems to me that the taxes for the previous years of 1857, 1858, & 1859, were advertised by me in 1861, which was defective. When I sold the lands I sold them under Turner's advertisement.

To the introduction of this testimony as explanatory of the deeds offerred by the defendant the plaintiff objected, for the reason that the deeds themselves were the best evidence of the facts therein recited, and to the introduction of the deeds for the reasons above stated; which objections were all overruled by the court, and the deed and evidence of said Tostevin admitted, the first deed not as evidence of title but as introductory to the admission of the second, and the parol testimony of Tostevin to show that no regular sale took place in 1861 and that
69 there were regular adjournments from time of advertisement until the sale took place under which defendant claims; to which rulings the plaintiff at the time excepted.

Defendant next offered in evidence a quitclaim deed from W. H. M. Pusey and wife to Frank. Street, in words and figures as follows, to wit:

Quitclaim deed—W. H. M. Pusey and wife to Frank. Street.

Filed Aug. 30th, 1865, at 11 o'clock a. m.
Recorded in book X, at page 556.

W. G. CRAWFORD, *Recorder.*

Know all men by these presents that we, W. H. M. Pusey and wife, of the county of Pottawattamie, and State of Iowa, for the consideration of three hundred dollars, hereby quitclaim to Frank. Street, of the county of Pottawattamie and State of Iowa, all our right, title, and in-
70 terest in and to the following-described tract, lot, or parcel of land situated in the county of Pottawattamie and State of Iowa, to wit:

Lot one hundred and seventy-two, (172,) in the original plat of Council Bluffs, Iowa.

In witness whereof we have hereunto subscribed our names this 10th day of April, A. D. 1865.

W. H. M. PUSEY.
S. ELLEN PUSEY.

[50 cents R. stamp.]

STATE OF IOWA, *Pottawattamie County:*

On this 8th day of April, A. D. 1865, personally appeared before me, a notary public in and for said county of Pottawattamie and State of Iowa, W. H. M. Pusey and S. Ellen Pusey, personally known to me to be the identical persons whose names are affixed to the above conveyance as granters, and acknowledge the execution of the same to be their voluntary act and deed, for the uses and purposes therein named.

71 In witness whereof I have hereunto set my hand and seal this 10th day of April, A. D. 1865.

[SEAL.] J. M. PALMER,
Notary Public.

To the introduction of which the plaintiff, at the time, objected, for the reason that said deed confers no title on defendant. Objection overruled. Plaintiff excepted. Defendant offered to prove by Pusey that he sets up no title to the property adverse to the title of Street, and that he is willing to convey to Street. Testimony objected to by plaintiff, and excluded by the court; to which defendant excepts.

Pusey testified that he knew the property in controversy. I am the person who held a tax-deed for the property. Judge Street has possession of the property with my knowledge and consent.

Defendant offered to prove by Pusey that he would have made
72 another quitclaim deed to Street, but for the interposition of plaintiff, who requested it not to be done until this suit was determined. Plaintiff objects. Objection sustained. Defendant excepts.

REBUTTING TESTIMONY.

E. A. HUBER. I am deputy treasurer. The treasurer is absent in New York. I have possession of the office. I have searched in my office for certificate of sale made to Palmer for lot 173 and 172, in original town of Council Bluffs. I could not find it among the papers that are there; I looked carefully. I examined through the old certificates where this certificate should have been found, and it is not there. The plaintiff then offered in evidence a certified copy of the original certificate of purchase, in words and figures as follows, to wit:

(Copy of original.)

STATE OF IOWA, *Pottawattamie County:*

Know all men by these presents that, whereas the following-
73 described real property, viz, a part of lot 173, known as Mullin's, and all of lot 172, in the original town of Council Bluffs, situated in the county of Pottawattamie and State of Iowa, was subject to taxation for the years A. D. 1857, 1858, 1859; and whereas the taxes on said real estate so assessed and delinquent were as follows:

			KIND OF TAX.												
Description.	Lot.	Year.	State.	Int.	County.	Int.	School.	Int.	Road.	Int.	District.	Int.	Costs.	Total Tax.
Part of lot in original town.	173	1857	2 00	1 66	6 00	4 98	0 50	0 42	1 00	0 84	.....	.....	....	17 40
27½ feet off west side, redeemed Jan. 2, '64 $19 60.	173	1858	0 60	0 35	2 40	1 40	0 20	0 12	0 40	0 24	1 20	0 71	....	7 62
	173	1859	0 75	0 25	2 50	0 83	0 50	0 17	.....	.....	2 50	0 83	0 30	8 63
	172	1857	4 00	3 33	12 00	9 99	1 00	0 83	2 00	1 66	.....	.....	....	34 81
	172	1858	0 75	0 44	3 00	1 74	0 25	0 15	0 50	0 42	1 50	1 23	....	9 98
	172	1859	2 25	0 75	7 50	2 50	1 50	0 50	.....	.....	7 50	2 50	0 30	25 30
Certificate.....	....	....	....	....	.....	....	.....	.....	.....	.....	.....	.....	....	50
Grand total.....	....	....	....	....	.....	....	.....	.....	.....	.....	.....	.....	....	$104 24

74 And whereas, the taxes assessed upon the said real property for the years 1857, 1858, 1859, aforesaid, remained due and unpaid at the date of the sale hereinafter named: And, whereas, the treasurer of

said county, did, on the 21st day of March, A. D. 1862, by virtue of the authority in him vested by law, at the sale begun and publicly held on the first Monday of December, A. D. 1860, expose to public sale, at the treasurer's office, in the county aforesaid, in substantial conformity with all the requisitions of the statute in such case made and provided, the real property above described, for the payment of the taxes, interests, and costs then due and remaining unpaid on said property; and, whereas, at the time and place aforesaid, H. M. Palmer, of the county of Pottawattamie, and State of Iowa, having offered to pay the sum of one hundred and four dollars and twenty-four cents, being the whole amount of taxes, interest, and costs then due and remaining unpaid on
75 said property for all the above-described property, which was the least quantity bid for; and payment of said sums having been made by him to the said treasurer, the said property was stricken off to him at that price.

This therefore, is to certify that, in consideration of the payment of said taxes, interests, and costs, and the sale of the said real estate aforesaid, said H. M. Palmer will, unless the same is redeemed according to law within three years from the date of said sale, be entitled to receive from the treasurer of said county, upon the return of this certificate, a deed, vesting the title in himself, his heirs or assigns, forever; subject, however, to the further rights of redemption provided by law.

In witness whereof I, Thomas Tostevin, treasurer as aforesaid, have hereunto subscribed my name, on this 21st day of March, A. D. 1862.

THO'S TOSTEVIN,
Treasurer.

76 *Copy of assignment.*

For value received I hereby assign my right, title, and interest to the within lots to W. H. M. Pusey.

Sept. 10th, 1864.

HELEN M. PALMER.

TREASURER'S OFFICE, POTTAWATTAMIE COUNTY,
Dec. 6th, 1867.

I, Thomas Tostevin, treasurer of the county aforesaid, do hereby certify that the within certificate is a correct copy of the original certificate of sale now on file in this office.

THO'S TOSTEVIN,
Treasurer.

(Objected to by defendant as irrelevant, immaterial, and incompetent; second, proper foundation not made for introducing copy. Certificate admitted. Defendant excepts.)

77 Defendant then offered to prove by Thomas Tostevin that the parcels of land described in certificate of purchase were sold separately, and not in bulk. (Examines book of record.) It is common to put a number of tracts in one certificate to avoid expense. Lots 172 and 173 were sold separately, as shown by the tax-book; the lands were sold separately. We never sold more than one lot at a time. It never was the custom of the office to sell more than one tract at a time.

Record so far introduced—it relates to lots 172 and 173; register of sales of real estate, Pottawattamie County, Iowa, as shown by said register of tax sales, kept by the treasurer of said county, shows that lot 172 and part of 173, in the original plat of Council Bluffs, was sold by said treasurer March 21st, 1862, and the record thereof, as made by said treasurer, is in words and figures following, to wit:

Description.	Lot.	Year delinq't.	State.	Int.	County.	Int.	School.	Int.	Road.	Int.	Teachers' fund.	Int.	Costs.	Total.	Part sold.	To whom sold.	Date of sale.
Original plat	172	1857	4 00	3 33	12 00	9 99	1 00	0 83	2 00	1 06				34 81	All..	H. M. Palmer	M'ch 21, 1862
	172	1858	0 75	0 44	3 00	1 74	0 25	0 15	0 50	0 42	1 50	1 23		9 98	All..	H. M. Palmer	M'ch 21, 1862
	172	1859	2 25	0 75	7 50	2 50	1 50	0 50			7 50	2 50	0 30	25 30	All..	H. M. Palmer	M'ch 21, 1862
Part of	173	1857	1 60	1 36	4 80	4 08	0 40	0 34	0 80	0 68				14 06	All..	H. M. Palmer	M'ch 21, 1862
	173	1858	0 75	0 45	3 00	1 80	0 25	0 15	0 50	0 30	1 50	0 90		9 60	All..	H. M. Palmer	M'ch 21, 1862
	173	1859	0 75	0 27	2 50	0 88	0 50	0 18			2 50	0 88	0 30	8 76	All..	H. M. Palmer	M'ch 21, 1862
71¼ feet of	173	1857	2 00	1 66	6 00	4 98	0 50	0 42	1 00	0 84				17 40	All..	H. M. Palmer	M'ch 21, 1862
	173	1858	0 60	0 35	2 40	1 40	0 30	0 12	0 40	0 24	1 20	0 71		7 62	All..	H. M. Palmer	M'ch 21, 1862
	173	1859	0 75	0 25	2 50	0 83	0 50	0 17			2 50	0 83		8 63	All..	H. M. Palmer	M'ch 21, 1862

* Mare B. Williams redeems 27¼ feet on the west side of lot 173, Oct. 19th, 1863, for $19 10.

79 The above foregoing is a full, complete, and correct statement of all the evidence submitted to the court on the trial of said cause, together with the rulings of the court in the admission and exclusion of evidence with the objections to its introduction and exceptions to the rulings thereon, and the court having found for defendant, and ordered that judgment be rendered against the plaintiff for costs, the plaintiff at the time excepted to the finding, rulings, and judgment of the court, and, by agreement of parties, sixty days from the adjournment of court was given to settle, sign, and file the bill of exceptions; and, the bill of exception being not then signed, the parties, by their attorneys, appear and mutually agree that the bill may be signed at this date, and the same is accordingly done.

Witness my signature this 2nd day of December, A. D. 1868.

JAMES G. DAY,
Judge 3d District, Iowa.

80 Bill of exceptions filed December 2d, A. D. 1868.

E. F. BURDICK, *Clerk.*

Also a paper endorsed "Notice on appeal," in the words and figures following, to wit:

District court, Pottawattamie County, Iowa. June term, 1868.

MICHAEL HURLEY }
vs.
FRANK. STREET. }

To Frank. Street, defendant in the above-entitled cause, or to Clinton and Sapp, his attorneys of record:

You are hereby notified that the plaintiff in the above cause has appealed from the rulings and judgment of the district court in said cause, to the supreme court of the State of Iowa.

BALDWIN & WRIGHT, AND
PRICE & JAMES,
Attorneys for Plaintiff.

81 We acknowledge due and legal service of the above notice, this the 2nd day of December, 1868.

CLINTON & SAPP,
Attorneys for Defendant.

Also, another paper endorsed "Notice of appeal," in the words and figures following, to wit:

District court, Pottawattamie County, Iowa. June term, 1868.

MICHAEL HURLEY }
vs.
FRANK. STREET. }

To E. F. Burdick, clerk of the district court of Pottawattamie County, Iowa:

You will take notice that the plaintiff in the above entitled cause has

appealed from the judgment of the district court, in said cause, to the supreme court of the State of Iowa.

BALDWIN & WRIGHT, AND
PRICE & JAMES,
Attorneys for Plaintiff.

82 I acknowledge service of the above notice, by reading and copy, delivered to me this 2nd day of December, 1868, at Council Bluffs, Iowa.

E. F. BURDICK,
Clerk Dist. Court.

Also, another paper entitled "Agreement in regard to notice to the clerk," in words and figures following, to wit:

MICHAEL HURLEY
vs.
FRANK. STREET.

It is agreed between C. Baldwin, attorney for plaintiff, and W. F. Sapp, attorney for defendant, in the above cause, that E. F. Burdick as clerk, may acknowledge service of notice of appeal as on the 2nd day of December, 1863.

C. BALDWIN,
Att'y for Plaintiff.
W. F. SAPP,
Att'y for Defendant.

83 STATE OF IOWA, *Pottawattamie County:*

I, W. G. Crawford, clerk of the district court within and for the county aforesaid, do hereby certify that the foregoing pages contain a full, true, correct, and complete transcript of all the papers and record-entries in the aforesaid cause, as full, true, correct, and complete as the same remain *of record* now on file and of record in my office, and that this transcript was prepared by order and for the use of the plaintiff.

In testimony whereof I hereunto set my hand and affix the seal of said district court hereto, at my office, in Council Bluffs, Iowa, this 27th day of February, A. D. 1869.

W. G. CRAWFORD,
Clerk Dist. Court.

84 At a term of the supreme court of the State of Iowa, begun and held at the capitol, in the city of Des Moines, on Tuesday, the 7th day of December, A. D. 1869—

Present, the Hon. Chester C. Cole, Hon. George G. Wright, Hon. Joseph M. Beck, judges—

When the following, among other proceedings, were had and done, to wit:

TUESDAY, *December 14th*, 1869.

MICHAEL HURLEY, APP'L'T,
vs.
FRANK. STREET.

Appeal from Pottawattamie district court.

On this day, this cause coming up for hearing, is submitted to the consideration of the court on oral argument of counsel.

And at the argument term of said court, held at Davenport, on the 8th day of April, 1870—

Present, the Hon. Chester C. Cole, C. J.; Hon. George G. Wright, Hon. Joseph M. Beck, Hon. Elias H. Williams, judges—

It was ordered by the court that said cause be set down for re-argument at the June term, 1870, at Des Moines. on the first day thereof.

85 And, at said term of said court, held at the city of Des Moines, on the 10th day of June, 1870, the same members of court being present, the following entry was made of record.

A re-argument having been heretofore ordered herein, and this cause now coming up for hearing, it is submitted to the court on oral argument of counsel.

And afterwards, to wit, on the 31st day of August, A. D. 1870, the same members of court being present, the following entry was made of record.

MICHAEL HURLEY, APP'L'T,
vs.
FRANK. STREET,

Appeal from Pottawattamie district court.

This cause having been heretofore submitted to the consideration of the court, and the court being now fully advised in the premises, find there is no error in the judgment of the district court, and file their written opinion—Wright, J., dissenting as to one point.

It is therefore considered by the court that the judgment of the court below be, and it hereby is, affirmed; that a writ of procedendo issue accordingly, and that the appellee have and recover of, and from the appellant, the costs of this court, taxed at $; and that execution issue therefor.

86 *Opinion.*

MICHAEL HURLEY, APP'L'T,
vs.
FRANK. STREET.

Appeal from Pottawattamie district court.

Action for the recovery of real property, to wit, lot 172, in the original plat of the city of Council Bluffs. The petition is in the usual form; plaintiff avers that he is the absolute owner and entitled to the present possession of the lot. The defendant, for answer, denies the averments of the petition, seriatim; and for sixth count of his answer avers that he is the owner of the lot, and derived his title by purchase thereof at a tax-sale, March 21st, 1862, for taxes of 1857, 1858, 1859, by one Palmer, who assigned the certificate of purchase to Pusey.

7th. That Pusey obtained a tax-deed from the treasurer thereon, March 22d, 1865, and sold and conveyed to plaintiff by quitclaim-deed, April 10th, 1865.

8th. That, afterwards, the treasurer discovered that the deed
87 first made to Pusey contained an error in not stating that said lot was sold separately from other property, and thereupon he

made, on Sept. 1st, 1866, another deed showing the separate sale of said lot, and thereby conveyed to Pusey the title he intended to convey by the first deed.

9th. That more than five years have elapsed since said sale, and plaintiff's action is thereby barred. Copies of the two tax-deeds and of the quit-claim by Pusey to defendant are annexed to the answer.

The plaintiffs demurred to the 6th, 7th, 8th, & 9th counts of the answer, because: 1st, the first deed to Pusey is void on its face, and conveys no title; 2nd, the treasurer had no power to make the second deed; 3d, the facts stated do not show that plaintiff's right of action is barred; 4th, the law authorizing the sale is unconstitutional and void; 5th, the sale was not made at a time fixed by law, and is void. This demurrer was overruled, and plaintiff excepted.

There was a trial to the court, and the following testimony
88 introduced. Plaintiff introduced proof showing title in himself, and rested. Defendant then introduced a copy of the tax-deed made by the treasurer to Pusey, of date March 22d, 1865, showing the sale of lot 172, and forty-four feet of lot 173, together, for the aggregate of the taxes on both; also, a copy of the second tax-deed made by the treasurer to Pusey, of date September 1st, 1866, showing the sale of each lot separate, and reciting that it was made for the purpose of correcting an error in a tax-deed made to the same property on the 22d day of March, 1865.

The plaintiff objected to the introduction of these deeds. In support of his right to introduce the same, the defendant introduced as a witness, Thomas Tostevin, who testified that he was treasurer at the time the sale and deeds were made. The lot and lands were advertised for sale for taxes on the first Monday in December, 1860, and the sales
89 were adjourned from time to time, but at no time for more than two months up to the sale of the lot in controversy. There was no advertisement for tax-sales in 1861, and the lot was sold under the advertisement of 1860. There was no record kept of the adjournments, but notice thereof was given by posting up written notices in the treasurer's office. This evidence was also objected to, but the objection was overruled, and defendant then introduced the quitclaim-deed made by Pusey to himself, of date April 10th, 1865, and rested.

Plaintiff then introduced the certificate of sale made by the treasurer to the purchaser, showing the taxes, interests, and costs, &c., upon each lot separately, but reciting that the purchaser having offered to pay the sum of one hundred and four dollars and twenty-four cents, being the whole amount of taxes, interests, and costs then due and remaining unpaid on said property for all the above-described property,
90 which was the least quantity bid for, &c.

The defendant then recalled the witness Tostevin, who testified that the parcels described in the certificate were sold separately; the tax-book so shows the sale also; it never was the custom of the office to sell more than one parcel at a time.

The record of tax-sales was then introduced, showing the sale of lot 172 separately, which was all the evidence.

The district court found for the defendant, and the plaintiff appeals.

Baldwin & Wright for appellant; E. H. Stiles, W. F. Sapp, and Frank. Street, pros., for appellee.

91 COLE, Ch. J.

I. We have heretofore decided that the five years' limitation of the statute (Rev., sec. 790) does not begin to run until the execution

and recording of the tax-deed, (Eldridge vs. Kuehl, 27 Iowa,) and hence the ninth count of the answer did not set up facts constituting a bar to the action under the statute, and the demurrer thereto should have been sustained. But the plaintiff did not stand upon his demurrer and suffer judgment against him. The cause was fully tried upon its merits, without reference to the statute of limitations, and no prejudice whatever has resulted to plaintiff by reason of the erroneous ruling upon that point of the demurrer. It does not, therefore, constitute any ground for a reversal.

The same is true as to the first point in the demurrer, to wit, that the first tax-deed to Pusey was void on its face, and conveyed no
92 title. The deed is the same as that held void by this court in Boardman vs. Burne, 20th Iowa, 134. But it was held in Finley vs. Brown, 22 Iowa, 538, that it was not a prejudicial error to allow such deed to be read in evidence.

II. The same point as to the power of the treasurer to make a second and corrected deed when he had made the first and void one is made by the demurrer, and also by objection to its introduction as evident in the case. This point has been ruled, at the present time, against the objection made by plaintiff in the case of McCready vs. Sexton, (ante, p'g 374,) holding that the treasurer has the power. In this case, the proof by the record of tax-sale, by the testimony of the treasurer, is clear and abundant that the sale of the lot in controversy was separate from the other, and as recited in the second deed. The correction was made so as to accord with the record, and affords a good illustration of the justness and wisdom of the rule held in the case cited.

93 III. It was further objected both by the demurrer and upon the introduction of the deeds in evidence that the sale of the lot in controversy was at a time not authorized by law.

The objections being grounded upon the fact that the sale took place in March, 1862, upon an advertisement made for a sale in December, 1860, thus being carried by adjournment over the time fixed by statute for the succeeding annual sale. A care' reading of the statute and its amendments will show the error of objector. Rev., sec. 764, provides for the advertisement or notice of sale for taxes. A part of said section as orignally enacted, is as follows:

It is required that such advertisement shall state the time and place of sale, and contain a description of the several parcels of real estate to be sold, *as the same are recorded on the tax-list, the amount of*
94 *taxes for each year* and amount of interest and costs against each tract, and the name of owners, when known, or persons, if any, to whom taxed. * * * * * * *

Sect. 773 provides for adjournments of the sale "from time to time, not to exceed two months at a time, until the next regular annual sale or until all the taxes shall have been paid." Afterwards, at the extra session of the legislature, in 1861, (see Sess. Laws, ex. session, 1861, chap. 24, sec. 5, page 32,) the above words in *italics* were repealed, and the following enacted in their stead, to wit, "For the delinquent taxes of the preceding year, and such real property as has not been advertised for the taxes of the previous years and on which the taxes remain due and delinquent, and the amount of taxes."

Taking all these provisions together, it is reasonably clear that real property is to be advertised but once, and that the sale of such real estate once advertised may be made at any time thereafter, pur-
95 suant to adjournments regularly made.

IV. It is also objected that the quitclaim-deed made by Pusey

to defendant conveyed no title, since Pusey only held the title under the first tax-deed, which was void, and conveyed no title to him, and the title acquired by Pusey under the second tax-deed did not enure to this defendant, who is therefore not the owner of the property.

This might all be conceded, and yet the plaintiff is not thereby aided in his action, since he must recover upon the strength of his own title, which, as we have seen, was divested by the conveyance to Pusey, and not on the weakness of defendants.

Affirmed.

Wright, J., dissenting as to the power to make the second deed.

96 STATE OF IOWA:

Supremecourt, Dec. term.

MICHAEL HURLEY, APP'L'T,
vs.
FRANK. STREET, APPELLEE.

Assignment of errors.

1st. The court erred in overruling pl'ff's demurrer to def't's answer.

2d. The court erred in overruling the pl'ff's objections to the admission in evidence of the deed to def't's referred to in the answer as Ex. "A."

3d. The court erred in overruling the pl'ff's objections to the admission in evidence of the second deed to def't, marked in the answer as Ex. "C."

4th. The court erred in the admission of Tho's Tostevin's evidence.

5th. The court erred in admitting in evidence the deeds referred to as Ex. "A" & "C."

6th. The court erred in rendering judgment for def't.

7th. The court erred in not rendering judgment in favor of pl't'ff.

PRICE & JAMES,
BALDWIN & WRIGHT,
For Appellant.

97 STATE OF IOWA, *Supreme Court:*

I, C. Linderman, clerk of the supreme court of Iowa, do hereby certify that the foregoing pages contain a full, true, and complete copy of all the papers filed in my office in the case of Michael Hurley vs. Frank. Street; also a full, true and complete copy of the record entries made in said court, and of the opinion of said court in said cause—as full, true, and complete as the same remain on file and of record therein.

In testimony whereof I have hereunto subscribed my name and affixed the seal of said court, this 30th day of January, A. D. 1871.

[SEAL.] C. LINDERMAN, *Clerk.*

98 To the Honorable Samuel F. Miller, associate justice of the Supreme Court of the United States:

Your petitioner, Michael Hurley, respectfully represents that he was the plaintiff in a certain action at law brought by him in the district court for the third judicial district of the State of Iowa, against one Frank. Street, to recover possession of certain real estate; that the said defendant, Frank. Street, had judgment thereon in said court, and your

petitioner thereupon took an appeal to the supreme court of the said State; that the said supreme court, on hearing of said appeal, affirmed the judgment of said district court by final judgment; that, in the said action, the right claimed by the petitioner under a patent issued by the United States and the validity of an authority exercised under the said State of Iowa, repugnant to the Constitution of the United States, were drawn in question, and the decision of the said supreme court of said State was adverse to the right so claimed and in favor of
99 the validity of said statute of said State, and that it so appears of record.

Wherefore your petitioner ask' that a writ of error be allowed by your honor directed to the said supreme court of said State of Iowa.

MICHAEL HURLEY.

MOORE & LANDER,
Counsel for Hurley.
APRIL 24, 1871.

Writ of error allowed by me this 26 Ap'l, 1871.

SAM. F. MILLER.

100

101 (Indorsed:) Michael Hurley vs. Frank. Street. Petition for writ of error.

102 THE UNITED STATES OF AMERICA, *ss:*

[SEAL.] The President of the United States to the honorable the judges of the supreme court of the State of Iowa, greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Michael Hurley, appellant, and Frank. Street, appellee, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United
103 States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty or statute of, or commission held under, the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said Michael Hurley, as by his complaint appears: We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the first Monday of December next, in the said Supreme Court, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Salmon P. Chase, Chief Justice of the said Supreme Court, the first Monday of December, in the year of our Lord one thousand eight hundred and seventy.

Issued April 26, 1871.

D. W. MIDDLETON,
Clerk of the Supreme Court of the United States.

Allowed by—

SAM. F. MILLER,
Asso. Ju. Sup. Court U. S.

104 The United States of America to Frank. Street, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the first Monday of December next, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Iowa, wherein Michael Hurley is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Sam. F. Miller, associate justice of the Supreme Court of the United States, this 26th day of April, in the year of our Lord one thousand eight hundred and seventy-one.

SAM. F. MILLER.

105 Know all men by these presents that we, Michael Hurley and William Hurley, are held and firmly bound unto Frank. Street in the full and just sum of five hundred dollars, to be paid to the said Frank Street, his certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally by these presents, sealed with our seals and dated this 26th day of April, in the year of our Lord one thousand eight hundred and seventy-one.

Whereas lately, at a term of the supreme court of the State of Iowa, in a suit depending in said court between Michael Hurley and Frank. Street, judgment was rendered against the said Michael Hurley; and the said Michael Hurley having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Frank. Street, citing and admonishing to be and appear at a Supreme Court of the United States, to be holden at Washington, the first Monday of December next:

Now, the condition of the above obligation is such, that if the said Michael Hurley shall prosecute said writ of error to effect and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

Sealed and delivered in the presence of—

(S'g'd) MICHAEL HURLEY. [L. S.]
" W'M HURLEY. [L. S.]

Approved by—

(S'g'd) SAM. F. MILLER,
Asso. Jus. Sup. C't U. S.

(Indorsement on cover:) No. 354. Michael Hurley, plaintiff in error, vs. Frank. Street. Iowa sup. court. Filed 19th October, 1871.

In the Supreme Court of the United States.

MICHAEL HURLEY, Plaintiff in Error,
vs.
FRANK STREET, Defendant in Error.

ERROR TO THE SUPREME COURT OF IOWA.

The motion is made to dismiss this writ, for want of jurisdiction in this court, under the judiciary act of Congress.

This is a writ of error to the Supreme Court of the State of Iowa, and allowed upon the ground, that in said action the right claimed by the plaintiff, under a patent issued by the United States, and the validity of an authority exercised under the said State of Iowa, repugnant to the Constitution of the United States, was drawn in question, and the decision of the said Supreme Court of said State was adverse to the right so claimed, and in favor of the validity of said statute of said State. P. 31 of Record.

This was an action to try titles, the plaintiff claiming under an entry of the land dated May 10, 1854, in favor of Frank Street, judge of the county court of Pottowotamie county, Iowa, and mesne conveyancer to plaintiff. The defendant claimed title under a deed issued under a sale for taxes, made under the revenue acts of the State of Iowa, the 74th section of which provides that such deed should be *conclusive evidence* of the following facts:

1. That the property had been listed and assessed at the time and in the manner required by law.

2. That the taxes were levied according to law.

3. That the property was advertised for sale, in the manner and for the length of time required by law.

4. That the property was sold for taxes, as stated in said deed.

5. That the grantee named in the deed was the purchaser.

6. That the sale was conducted in the manner required by law.

7. That all the prerequisites of the law were complied with by all the officers who had, or whose duty it was to have had, any part or action in any transaction relating to or affecting the title conveyed, or purporting to be conveyed, by the deed, from the listing and valuation of the property up to the execution of the deed, both inclusive, and that all things whatsoever required by law to make a good and valid sale, and to vest the title in the purchaser were done, except in regard to the three points named in this section, wherein the deed should be *prima facie* evidence only.

To the plea of defendant setting up this title, the plaintiff interposed a demurrer, the 5th point of which was, "the law authorizing the sale of real property for delinquent taxes, and under which the deed was made by which defendant claims title, is unconstitutional and void." P. 10 of record. This demurrer was overruled by the court, and this title admitted to prevail, and the Supreme Court upon revision thereof held this title valid, and as showing an outstanding legal title. P. 29, 30.

This act contravenes the 5th article of the amendment to the Constitution of the United States, which provides that a deed, so made under the law precluding the owner from showing that any one of the prerequisites to such sale, specified in such law as conclusive evidence, had not been complied with, is unconstitutional and void, and so the Supreme Court of Iowa have held in the case of

M'Cready *vs.* Sexton, 2 Iowa R., p. 356. But that court, however, do not state what provision of the Constitution is infringed, nor whether the Federal or State Constitution.

It is submitted, however, that the title of the plaintiff, derived from the United States, was divested by the courts of Iowa, under a law in direct violation of the clause of the Federal Constitution above quoted. The legislature attempted to pass a law which nominally for the purpose of enabling it to collect its revenues, (a trifle compared with the value of the property assessed,) really operated to divest the owner of his entire title, whether the remedy pursued was legal or otherwise.

It may not be irrelevant to advert here to the powers of the legislatures of the States. It is true that our laws and institutions have for their basis the English common law. In England, the Parliament is the sovereign or supreme power, and as it prescribes the law, it is prescribed by the supreme power of the State. But in this country, where the supreme power resides in the people, the only law, prescribed by the supreme power, is the Constitution. First in rank is the Federal Constitution, to which all State Constitutions must conform, and are subordinate; all other laws are prescribed by the legislatures, which, so far from being supreme, has only a limited legislative authority.

In the case of Gaines *et al vs.* Buford, 1 Dana, 499, Judge Woodward, after deciding an act of the Kentucky legislature, which forfeited lands to the commonwealth, and then gave them to the occupant, unless the owner, in a given time after passage of the act, should make certain improvements on them, to be unconstitutional, says: "I shall notice one idea more in the defense of this act, and only one. It is the appeal made in the preamble to the *sovereign power of the State*. I do not admit that there is any sovereign power in the literal meaning of the term,

to be found anywhere in our system of government. The people possess, as it regards their governments, a *revolutionary sovereign power*, but so long as the governments remain, which they have instituted to establish justice, and to secure the enjoyment of the right of life, liberty and property, and of pursuing happiness, sovereign power; or which I take to be the same thing, *power without limitation*, is no where to be found in any branch or department of the government, either State or national, nor within all of them put together.

The Constitution of the United States expressly forbids the passage of a bill of attainder or *ex post facto* law, or the granting of any title of nobility by the general or State governments. The same instrument likewise limits the powers of the general government to those expressly granted, and places many other restrictions upon the powers of the State governments."

The same principles are held in the case of Holden *vs.* Jones, 11 Mass., 404, where the court, speaking of the power to suspend laws, or to interfere with their operation, says: "There is an implied reservation of authority in the Parliament to exercise the power here mentioned, because, according to the theory of the English constitution, that absolute despotic power which must, in all governments, reside somewhere, is entrusted to Parliament. The principles of our government are widely different in this particular. Here the sovereignty and absolute power reside in the people, and the legislature can only exercise what is delegated to them, according to the Constitution. It is shown that the exercise of the power in question would be equally oppressive to the subject, and subversive of his right to protection, according to the Constitution; whether exercised by one man or a number of men."

In Williams *vs.* Peyton's Lessee, 4 Pet. Con., 395, Chief Justice Marshall says: "It is a general principle,

that a party who sets up a title, must furnish the evidence necessary to support it. If the validity of a deed depends upon an act *in pais*, the party claiming under law, is as much bound to prove the performance of that act, as he would be bound to prove any matter of record, on which its validity might depend."

Also, see Thatcher *vs.* Powell, 5 Pet. Con., 32; Rix *vs.* Coke, 1 Cowp., 26.

It may, however, be contended that the plaintiff did not bring this question specially to the notice of the court below, and that therefore no such decision was rendered as is required by the judiciary acts of Congress. The record is silent upon the subject, except in the pleadings, where the objection is made to this title, on account of its unconstitutionality. Could the title set up by the defendant have been sustained under the pleadings, without its being held by the court that the law authorizing said deed was constitutional? Clearly not; for upon that deed rested the entire defense, and upon that deed the court declared the legal title to this land to be not in the defendant, but that the title of plaintiff had been divested by law, and that the legal title was in the grantee under the tax deed.

This brings the case within the purview of the decisions of the Supreme Court. In the case of The Bridge Proprietors *vs.* The Hoboken Company, 1 Wallace, 116, the court says:

"It is objected, however, by the defendants, that the pleadings do not, in words, say that the statute is void, because it conflicts with the Constitution of the United States, and do not point to the special clause of the Constitution supposed to render the act invalid. It would be a new rule of pleading, and one altogether superfluous, to require a party to set up specially the provisions of the Constitution of the United States on which he relies for the action of the court, in the vindication of his rights. If the

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courts of this country, and especially if this court, can be supposed to take judicial notice of anything without pleading it specially, it is the Constitution of the United States, and if the plaintiff or the defendant, in their pleadings, make a case which necessarily comes within some of the provisions of that instrument, this court can surely recognize the fact without requiring the pleader to say, in words, 'this paragraph is the one involved in this case.' "

Also to the same effect, Furman *vs.* Nicholl, 8 Wall., 44; Armstrong *vs.* Furman, 16 Pet., 281; Crowell *vs.* Randall, 10 Pet., 368.

This seems to be the rule, although this court have in other cases, where, from an inspection of the record it did not clearly show which clause of the Constitution was infringed, and where the case might have been determined without deciding against any right claimed under the Federal Constitution, dismissed the writs of error.

As above stated, however, the demurrer set forth the constitutionality of the law, the demurrer was overruled, the Supreme Court passed upon the demurrer sustaining the decision of the court, and thus decided that the tax deed, was admissible and prevailed against the title of the plaintiff to the land in controversy.

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